Supreme Court, U.S.
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No. 09-535

In The Supreme Court of the United States

GREGORY J. PAPIERZ,
Petitioner,
v.
SCOTT JACKSON; BRYAN ERGANG,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

Petitioner was arrested by Respondents for a minor traffic offense. Respondents claim that they conducted a lawful search incident to the arrest in which they found 2 vicodin pills on the ground that they accused Petitioner of "tossing". The pills have been taken into evidence and are the subject of a Police Report.

In fact, the 2 vicodin pills were planted by Respondents for the purpose of framing Petitioner.

Neighbors confronted Respondents at the scene and told them they had seen them plant the pills and had a videotape. Respondents also learned at the scene from Petitioner that he had recently been lawfully prescribed and purchased vicodin following a cardiac diagnostic procedure.

Caught in the act, Respondents abandoned further criminal investigation of Petitioner and criminal charges for possession of the vicodin were not pursued.

This Petition for Certiorari presents a simple question:

1. Does the Fourth Amendment to the Constitution of the United States protect a person from a search by police officers in which the police officers plant evidence for the purpose of framing the person?

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OPINIONS BELOW

The District Court for the Western District of Michigan did not write and opinion and ruled against Petitioner in an oral opinion issued from the bench.

The Sixth Circuit affirmed the trial court in an opinion that was not recommended for full text publication. (Apdx. A)

JURISDICTION

The order appealed from was entered by the Sixth Circuit on August 3, 2009. (Apdx. A)

Petitioner seeks a Writ of Certiorari pursuant to Part III, Rules 10 through 16 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to
the Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 USC § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this

section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This lawsuit arises out of the events of February 16, 2006. Petitioner decided he would go bowling that evening. He stopped by the house of a fellow bowler to see if he wanted to go. His bowling companion lived at 2606 Texel Drive in Kalamazoo, Michigan. (Apdx. C-2) On the way, Petitioner stopped at a convenience store for a Gatorade. As he paid, the sales clerk suggested he buy a packet of herbal "male enhancement" pills. Petitioner agreed. (Apdx. C-3) After leaving the store, he drove about 2 miles to his bowling companion's house. Petitioner was driving his brother's pickup truck. He pulled into the driveway. As he got out of the vehicle, he was confronted by Respondents. (Apdx. C-3)

A succinct description of what Respondents claimed happened is contained in the Police Report filed by Respondent Jackson. The full Police Report was filed as Exhibit C on December 17, 2007, to Defendant's Motion for Summary Judgment in the District Court.

> I identified myself and told him that the reason I was stopping him was that he was driving without his headlights. I asked him for his license,

registration and proof of insurance, and asked why he had pulled in the driveway in which he was parked in. The driver handed me a license that was actually handed to SERGEANT ERGANG and the driver told me "I'm pulling into this driveway because I'm coming to see a friend." I asked who he was coming to see at this house, and he said it was a person by the name of "PERK."

SERGEANT ERGANG was running the driving status of the individual we were speaking with and we found that he had a suspended license. [1] SERGEANT ERGANG conducted a search of the person and placed him in the rear of his patrol car. While we were conversing reference his license being suspended, DISPATCHER SPENCER came back and indicated that the driver who we had, who was suspended, had a history of Violations of the Controlled Substance Act. Per the request of SERGEANT ERGANG, I

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[1]Actually, Petitioner's drivers license was not suspended. It had been a one time, but the Michigan Secretary of States records clearly shows that it was reinstated months earlier on August 1, 2005. (Apdx. C-5)

searched the vehicle incident to arrest and found nothing on the inside of the vehicle..

Because the driver was coming around from the front side of vehicle and it was not a normal path that a person would have taken to have gone to the house[2], and because he had a history of narcotics[3], I decided to search the grassy area to the right of his pickup near the driveway. I want the report to reflect that on 02-16-2006 we had a very severe rain/sleet storm, that the Weather Service had a tornado watch out for our area, and that for approximately an hour and a half to two hours prior to the traffic stop, it had downpoured in excess of approximately one inch of rain. The entire ground around the truck was wet.

When I started my search of the grassy area I found lying in the grass approximately 5-10 feet from the front end of the pickup truck a white pill labeled M360. When I reached down and picked up the pill from the wet

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[2]Petitioner denies having done so. (Apdx. C-4)

[3]Petitioner's prior history involved marijuana, not narcotics.(Apdx. C-9)

grass, the pill was completely dry and had no sticky or tacky feeling to it that would normally be associated with a pill that had gotten wet. The pill was completely dry and unaffected or bothered by the wet ground. I continued my search of the area and found another white pill labeled M360 which also was dry. These pills were sitting up on the top portion of the grass; the were not embedded or pushed down into the ground, as in my opinion they had been tossed in the grass by our driver.

I told SERGEANT ERGANG what I had found, and he said that when he searched the driver prior to putting him in the rear of the vehicle that he had found a packet of male enhancement pills and a capsule which was clear and had a white powdery kind of substance inside it. As I made my way back around to the driver side of the vehicle to conduct a search of the vehicle, I found another pill or capsule laying on the ground outside the driver's door. This pill or capsule laying on the ground outside the driver's door. The pill or capsule that I found on the ground was the same as the one that was found in the driver's pocket when

SERGEANT ERGANG searched the person.

I then took the pills that said M360 on them and one capsule and went to Borgess Hospital and contacted an E.R. doctor to confirm what they were. An E.R. doctor who was attending that evening said that the white pills with the M360 on them were definitely a vicodin pill or some sort of high dosage, and it was unknown what the clear capsule was.

I returned to the scene and assisted SERGEANT ERGANG with finishing the traffic stop and conducting interviews and then cleared from the investigation.

END OF REPORT.

What Respondent Jackson left out of his report of the details of the "interviews" he conducted. The only people he interviewed were Cameron Alger and Hollie Langdon. They lived next door to where Petitioner's car had been parked. The Affidavit of Cameron Alger states :

5. I saw a man, or men, in police uniforms dropping pills on the ground near my house in the area where Mr.

Papierz parked. Mr. Papierz did not toss or drop any pills on the ground.

6. It was my conclusion on the evening of February 16, 2006, that the police officers were planting evidence in the area of Mr. Papierz's truck as part of a plan to frame him with some kind of criminal offense.

(Apdx. D-2 to D-3)

The entire "interview" is contained on videotape. (Apdx. D-2) In no uncertain terms, Cameron Alger told Respondent Jackson that Petitioner had not thrown anything on the ground. To the contrary, the pills had been planted by the police officers.

Respondent Ergang questioned Petitioner about the vicodin pills (Apdx. C-7) Petitioner told Respondent Ergang that he had a prescription of vicodin due to a heart procedure a few weeks earlier. (Apdx. C-7) A copy of the actual prescription was Exhibit #5 attached to Petitioner's Affidavit filed in the District Court. Respondents never asked Petitioner to see his prescription for vicodin or did anything to verify that information. (Apdx. C-8)

Petitioner filed suit against Respondents pursuant to 42 USC §1983. The District Court had

jurisdiction, pursuant to 28 U.S.C. § 1331, because it presented a federal question arising under the Constitution and laws of the United States. With respect to Plaintiffs' claims based on 42 U.S.C.§ 1983 and 1985, the District Court also had jurisdiction pursuant to 28 U.S.C. § 1343.

42 U.S.C.§ 1983 creates a cause of action against individuals who, under color of state law, deprive citizens of rights or privileges secured by federal law. The 4th Amendment to the United States Constitution guarantees that persons will be protected from unreasonable searches of their persons or effects. In this case it is claimed that the unreasonable search was one in which Respondents planted narcotics for the purpose of framing Petitioner.

The District Court granted Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The District Court did not write an opinion, but granted Summary Judgment based upon an oral opinion from the bench (Apdx. B)

Petitioner appealed to the Sixth Circuit Court of Appeals. That Court of Appeals, in an unpublished opinion (Apdx. A), affirmed the lower court stating:

Papierz's claim fails initially upon analysis of the language of the Fourth Amendment itself, as the Officers' conduct of planting drugs on the ground in a public place did not involve any intrusion of Papierz's person, home, papers, or effects.

A Writ of Certiorari is sought pursuant to Part III, Rules 10 through 16 of the Rules of the Supreme Court of the United States.

ARGUMENT

A POLICE OFFICER WHO PLANTS EVIDENCE FOR THE PURPOSE OF FRAMING A PERSON VIOLATES THE FOURTH AMENDMENT.

The police report filed by Respondent Jackson states:

> When I started my **search** of the grassy area I found lying in the grass approximately 5-10 feet from the front end of the pickup truck a white pill labeled M360. When I reached down and picked up the pill from the wet grass, the pill was completely dry and had no sticky or tacky feeling to it that would normally be associated with a pill that had gotten wet. ... I continued my **search** of the area and found another white pill labeled M360 which also was dry. These pills were sitting up on the top portion of the grass; the were not embedded or pushed down into the ground, as **in my opinion they had been tossed in the grass by our driver.**
> (Emphasis supplied)

This report makes it beyond dispute that Respondent Jackson, in his capacity as a police

officer, conducted a search in which he claims to have found tangible objects that he opined belonged to Petitioner based upon circumstantial evidence.

The Fourth Amendment to the Constitution of the United States establishes one of the most fundamental rights:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Petitioner submits that the meaning of these words, in the context of his circumstance, is abundantly clear. Petitioner is a person. Respondent Jackson is a police officer. Respondent Jackson conducted a search of Petitioner's person or effects[4].

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[4]Websters New World Dictionary defines the word "effects" to mean: "8. *pl.* belongings, property; as,

Indeed, in his report, Respondent Jackson explained what he was doing:

> Because the driver was coming around from the front side of vehicle and it was not a normal path that a person would have taken to have gone to the house, and because he had a history of narcotics, I decided to search the grassy area to the right of his pickup near the driveway.

In other words, Respondent Jackson said that he was specifically looking for Petitioner's property or belongings because he suspected Petitioner might have thrown such property on the ground to avoid criminal prosecution for illegal possession. Following that search, Respondent Jackson opines that he has found property belonging to Petitioner.

If Respondents had actually been doing as they described in the Police Report, Petitioner would probably be in jail for illegal possession of vicodin based upon a search that fully complied with the Fourth Amendment. It is undisputed that it was lawful to approach Petitioner for driving at night with his parking lights, instead of his

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household *effects*."

headlights. The dispatcher did advise that Petitioner's license was suspended. Even though that information was ultimately shown to be incorrect, it justified the arrest. Respondents had a lawful right to search Petitioner's person and effects incident to the arrest. If they had actually found 2 vicodin pills as described by Respondent Jackson for which Petitioner did not have a prescription, Petitioner would have surely been charged, convicted, and imprisoned.

What makes this case unique is that Respondents planted the evidence. Petitioner submits that the planting of evidence for the purpose of framing an individual makes what would otherwise be a reasonable search without a warrant into an "unreasonable search" that violates the Fourth Amendment.

Petitioner is unable to cite to this court any specific decision of this Court, or any other court for that matter, that specifically so interprets the Fourth Amendment as this case appears to be one of first impression.

The Sixth Circuit went to misguided lengths to reject this simple analysis. The first mistake was to distinguish this case from other cases where the frameup proceeds farther before discovery. They

cite Spurlock v Saterfield, 167 F.3d 995, 1005 (6th Cir. 1999); LaBoy v Zuley, 747 F.Supp 1284, 1286-89 (N.D. Ill. 1990); and United States v Epley, 52 F.3d 571, 576 (6th Cir. 1995), but distinguish them as follows:

> The victims then typically challenge the constitutionality of the arrest or the charges brought in connection with the planted evidence.
> Apdx. A-6

Making this distinction is a profound mistake. The Founding Fathers created a "right" that exists separate and apart from the criminal justice process. Police are not allowed to enter a home without a warrant, conduct an invasive search simply to embarrass and harass and walk away without bringing criminal charges. The Fourth Amendment is about the act of the search itself without regard to anything that is intended or does occur thereafter.

The next error in the reasoning of the Sixth Circuit is to interpret the Fourth Amendment as involving a right of privacy. The Sixth Circuit stated:

> It is well settled that the Fourth Amendment protects against

> unreasonable instructions into areas where one has a reasonable expectation of privacy. See, e.g. Katz v United States.
>
> Apdx. A-7

With all due respect, that is not the legal principle settled by the landmark, 7-1, decision of Katz v United States, 389 U.S. 347 (1967). In fact, Justice Stewart stated in the opinion of the Court:

> ... the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and **often have nothing to do with privacy at all.**
>
> For the Fourth Amendment protects people, not places.
>
> **Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.**

That is all Petitioner seeks: freedom from this unreasonable search.

To put it another way, unless this Honorable Court is prepared to say that it is "reasonable" for a police officer to plant evidence for the purpose of framing an innocent person, this search was unreasonable and violated the Fourth Amendment. It seems bizarre to even contemplate that a reasonable search would involve planting evidence, yet that is, in fact, the consequence of the holding of the Sixth Circuit.

The remainder of the legal analysis of Petitioner's claim is simple. The Fourteenth Amendment to the Constitution of the United States authorizes Congress to enact legislation to enforce the constitutional rights of Citizens.

42 USC §1983 and §1885 to give individual Citizens the right to sue any individuals who, under color of state law, deprives the Citizen of a right, privilege or immunity granted by the Constitution of the United States.

The foregoing makes it abundantly clear that this Honorable Court should exercise it supervisory powers pursuant to Rule 10(a) of the Rule of the Supreme Court of the United States to overturn the decision of the Court of Appeals which departs from the fundamental rights guaranteed by the Founding Fathers in the Fourth Amendment.

CONCLUSION

Based on the arguments stated above, Petitioner, Gregory J. Papierz requests that this Honorable Court grant Certiorari.

DATED: October 29, 2009

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APPENDIX

SIXTH CIRCUIT COURT APPEALS FILING:

Opinion,
filed 08/03/09 . . . . . A1 - A15

WESTERN DISTRICT OF MICHIGAN FILINGS:

Order,
filed 03/27/08 . . . . . B1 - B1

Affidavit of Gregory J. Papierz,
filed 02/17/08 . . . . . C1 - C16

Affidavit of Cameron Alger,
filed 01/14/08 . . . . . D1 - D3

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 09a0533n.06

No. 08-1522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY J. PAPIERZ,
Plaintiff-Appellant,

v.

SCOTT JACKSON; BRYAN ERGANG,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: MOORE and WHITE, Circuit Judges; and OLIVER, District Judge.*

SOLOMON OLIVER, JR., District Judge. Plaintiff-Appellant, Gregory J. Papierz ("Papierz"),

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* The Honorable Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

appeals the order of the district court granting summary judgment in favor of Defendants-Appellees, Officer Scott Jackson ("Officer Jackson") and Sergeant Bryan Ergang ("Sgt. Ergang") (collectively, the "Officers"), on Papierz' s 42 U. S. C. § 1983 action for an alleged violation of his Fourth Amendment right to be free from an unreasonable search. For the following reasons, we **AFFIRM** the decision of the district court.

I. FACTUAL AND PROCEDURAL HISTORY

On February 16, 2006, at around 10:00 p.m., Papierz was on his way to a bowling alley when he decided to stop at a friend's apartment to see if he wanted to accompany him. (Joint Appendix ("J.A.") at 131.) On his way there, Papierz stopped at a convenience store and purchased a Gatorade as well as a packet of herbal male enhancement pills. (*Id.*) After leaving the convenience store, Papierz drove to his friend's apartment. Both Officer Jackson and Sgt. Ergang were working separately on routine road patrol in Kalamazoo, Michigan that evening, when, according to the Officers, they observed Papierz's

pick-up truck traveling with only its parking lights on and not the headlights. (J.A. at 48, 86.) The Officers signaled to him to stop. (*Id.*) Papierz pulled into his friend's driveway, and the Officers pulled in behind him. (J.A. at 49, 87, 132.) When Papierz got out of his vehicle, the Officers approached him and requested that he produce a driver's license. (J.A. at 51, 88, 133.) The Officers then contacted dispatch, who ran Papierz's name and date of birth through the Law Enforcement Information Network ("LEIN"). (J.A. at 51, 88.) The dispatcher informed the Officers that according to LEIN, Papierz had a suspended and expired license. (*Id.*)

Papierz thereafter consented to be searched by the Officers. According to the Investigation Report completed by the Officers, they found several pills in his left front pocket, which included the male enhancement pills, as well as what the Officers describe as an unknown pill in a clear plastic capsule. (J.A. at 108.) After completing this search, the Officers handcuffed Papierz and placed him in the back of a patrol car. (J.A. at 134.) They then searched his car but found nothing suspicious. They maintain, however, that they found several pills on the ground near Papierz's vehicle, which were identical to the unknown pill found in

his pocket. (J.A. at 108.) Officer Jackson then drove to the local hospital, where a doctor allegedly identified the pills as Vicodin. (J.A. at 54.)

When Officer Jackson returned with this information, Sgt. Ergang read Papierz his *Miranda* rights, which he waived. (J.A. at 134-35.) Sgt. Ergang then began questioning him about the Vie odin allegedly found near his car. (J.A. at 90.) Papierz replied that the pills found on the ground were not his, but that he had a prescription for Vicodin due to a recent heart surgery. (J.A. at 135.) Papierz later admitted that he had a bottle of Vie odin in the truck during this incident, but maintained that the pills that the Officers allegedly found on the ground were not his. (J.A. at 133.)

While Sgt. Ergang continued to question Papierz, Officer Jackson approached Cameron Alger and his wife, Hollie, who lived nearby and were watching and videotaping the interaction between the Officers and Papierz. (J.A. at 57, 90.) Officer Jackson asked them if they observed Papierz throw narcotics on the ground. (J.A. at 57.) Officer Jackson admits that they responded that they saw the Officers plant the drugs on the ground, and the neighbors indicated to the Officers that they videotaped these actions. (J.A.

at 57.) Sgt. Ergang also admits that he then lied to Papierz by telling him that the neighbors said that they saw him throw the pills on the ground and that they would testify against him to this effect. (J.A. at 90-91.) Consistent with the neighbors' account, Papierz maintained that the Vicodin on the ground did not belong to him. (J.A. at 227-28.)

After a forty-five minute investigation, the Officers issued Papierz a civil infraction for driving without his headlights on after dark. (J.A. at 155.) Upon releasing Papierz, the Officers advised him that they would continue to investigate the Vicodin issue as well as whether he was driving without a valid license. (J.A. at 93-94.) After the Officers consulted the township prosecutor about Papierz, they decided not to further investigate his alleged illegal possession of the Vicodin. (J.IA. at 157.) They did, however, issue a modified citation to Papierz that added the misdemeanor offense of driving with a suspended license. (J.A. at 160.) Papierz was not charged in connection with the Vicodin.

On February 2,2007, Papierz filed the instant action in the United States District Court for the Western District of Michigan, asserting a claim for false arrest under state law as well as a claim under 42 U.S.C. §§ 1983 and 1985 for violations of

his rights under the Fourth Amendment. (J.A. at 11.) In his Complaint, Papierz alleges that the Officers planted false evidence against him in an attempt to frame him for a crime he did not commit. (J.A. at 9.) He further alleges that he was arrested by the Officers without probable cause. (J.A. at 10.)

Thereafter, the Officers filed a Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) or Alternatively, Motion for Summary Judgment Pursuant to Federal Rule of Civil Procedure 56(c). (J.A. at 16.) The Officers sought dismissal of Papierz's Fourth Amendment claim on the grounds that the stop and frisk was reasonable pursuant to a valid stop and that the subsequent search of the car was valid because it was incident to his arrest. (J.A. at 31.) In addition, they noted that Papierz gave his consent to the search of his person. (*Id.*) They further argued that even if they conducted an unreasonable search of Papierz, they were entitled to qualified immunity. (J.A. at 39.) Lastly, they sought dismissal of Papierz's state law claim for false arrest, as the Officers had probable cause to arrest him based on the two misdemeanor traffic offenses that were discovered during the traffic stop. (J.A. at 41.) In his response to the Motion, Papierz withdrew his false arrest claim

under state law, conceding that the facts did not support this claim. (J.A. at 219.)

The district court then held a motion hearing regarding the remaining issues. (J.A. at 229.) At this hearing, Papierz's counsel emphasized that he was not contesting the legality of the stop, arrest, and search of his car. (J.A. at 242.) He also noted that "[t]his is a search case. It's not a seizure case." (*Id.*) Counsel clarified that Papierz was alleging that an unreasonable search occurred when the Officers planted the Vicodin on the ground outside ofPapierz's car. (J.A. at 245.)

After hearing the arguments of the parties, the district court first stated on the record that the Officers' Terry stop was proper as well as the Officers' arrest ofPapierz and subsequent search of his car. The court found that the Officers clearly had probable cause based on their reasonable belief that he committed two arrestable misdemeanors under Michigan law, driving without a valid license and driving at night without headlights. The court noted, however, that it did not need to make such a ruling as Papierz was not contesting the traffic stop, arrest, or search of his car incident to his arrest. (J.A. at 255-56.)

The court then held that framing a citizen with planted evidence when the charge does not actually "come to fruition" is not a constitutional violation under either the Fourth or Fourteenth Amendment. (J.A. at 258.) The court further found that had the framing actually "come to fruition," the Fourth Amendment still would not be implicated as there is no right under this Amendment for a citizen to be free from an attempt on the part of police officers to frame him. (*Id.*) Instead, it would be a violation of his due process rights under the Fourteenth Amendment. (J.A. at 258.)

Lastly, the court held, in the alternative, that qualified immunity protected the Officers from liability. (J.A. at 261.) Specifically, he found that, even if the Officers' actions did constitute a violation under the Fourth Amendment, this right was not clearly established. (J.A. at 262.) The court emphasized that police have great discretion in "their ability to use ruses, to use and lie to citizens. . . [to] try to escalate what they think they have on a person." (IA. at 259). Based on this analysis, the court granted summary judgment in favor of the Officers. (J.A. at 14.) Papierz timely appealed the district court's Order, arguing that the trial court

erred in its ruling with regard to the Fourth Amendment and qualified immunity.

II. STANDARD OF REVIEW

A district court's decision to grant a motion for summary judgment is subject to *de novo* review. *Little v. BP Exploration & Oil Co.*, 265 F.3d 357,361 (6th Cir. 2001). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits show that there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *LaPointe v. UAW Local 600*, 8 F.3d 376,378 (6th Cir. 1993).

III. LAW AND ANALYSIS

The facts at issue here are distinguishable from a typical case involving a police officer accused of planting false evidence. Generally, police officers are accused of planting evidence on a victim as a basis to arrest the victim and/or to charge him with an offense connected to the planted evidence. The victims then typically challenge the constitutionality of the arrest or the charges brought in connection with the planted

evidence. *See, e.g., Spurlock v. Satterfield*, 167 F.3d 995, 1005 (6th Cir. 1999); *LaBoy v. Zuley*, 747 F. Supp. 1284, 1286-89 (N.D. Ill. 1990) (finding that plaintiff could pursue a Section 1983 claim under the Fourth and Fourteenth Amendment against officers who allegedly planted false evidence in order to arrest and prosecute the victim); *see also United States v. Epley*, 52 F.3d 571, 576 (6th Cir. 1995) (holding that where officers planted evidence on victim as a means to arrest and charge him, the officer violated his Fourth Amendment right to be free from seizure without probable cause and due process rights to be free from false arrest and having false evidence presented against him).

Here, however, Papierz was not charged in connection with the allegedly planted Vicodin and does not challenge his arrest. He also concedes that the Officers had a basis to conduct a search of his car and his person. Papierz, instead, contends that the Officers conducted an unreasonable search under the Fourth Amendment by planting false evidence. The court, therefore, is presented with the limited issue of whether the Officers' purported conduct of planting Vicodin on the ground, in a public place near Papierz's car without charging him or arresting him for any crime

related to the drugs, gives rise to an unreasonable search in violation of the Fourth Amendment. We find that these particular circumstances do not.

The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV. It is well-settled that the Fourth Amendment protects against unreasonable intrusions into areas where one has a reasonable expectation of privacy. *See, e.g., Katz v. United States*, 389 U.S. 347,360 (1967); *Widgren v. Maple Grove Twp.*, 429 F.3d 575,578 (6th Cir. 2005); *United States v. Hopper*, 58 F. App'x 619, 623 (6th Cir. 2003) ("The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected, reasonable expectation of privacy.") (citation omitted). The Sixth Circuit has held that "[a]n individual may only claim the protection of the Fourth Amendment ifhe has a legitimate expectation of privacy in the premises being

searched." *United States v. Stuckey*, 253 F. App'x 468,479 (6th Cir. 2007) (citing *Katz*, 389 U.S. at 347).

In the instant case, Papierz's claim fails initially upon analysis of the language of the Fourth Amendment itself, as the Officers' conduct of planting drugs on the ground in a public place did not involve any intrusion of Papierz's person, home, papers, or effects. *See* U.S. Const. amend IV. This conclusion that no Fourth Amendment violation occurred is further supported by case law construing the bounds of the Fourth Amendment. The Sixth Circuit has established that a person does not have a reasonable expectation of privacy while on a friend's property, in which the person is merely a short-term visitor. *See United States v. Berryhill*, 352 F.3d 315, 317 (6th Cir. 2003) ("[A] casual, transient visitor does not have a reasonable expectation of privacy in his host's home."). Papierz was merely stopping by a friend's apartment to see if the friend wanted to accompany him to the bowling alley and had no reasonable expectation of privacy in the driveway of his friend's apartment. Furthermore, this Circuit has held that a person also lacks a reasonable expectation of privacy in items laying in the public's view. *See United States v. McClendon*, 86 F. App'x 92,94-95 (6th Cir. 2004)

(discussing *United States v. Oswald*, 783 F.2d 663 (6th Cir. 1986) and *United States v. Rumph*, No. 97-3135,1998 U.S. App. LEXIS 9584 (6th Cir. May 8,1998)). The drugs, in this case, were purportedly placed openly on the ground, available for public view. Thus, the Officers' purported conduct did not invade Papierz's reasonable expectation of privacy.

The court emphasizes, however, that this holding with regard to the Fourth Amendment is limited to the particular circumstances of the instant case. While the Officers have broadly argued that a person never has a reasonable expectation of privacy under the Fourth Amendment in circumstances where an officer plants evidence on one's person or effects but does not arrest or charge the person as a result, we need not address this issue.

At oral argument, the parties discussed at length whether the Officers' purported conduct gave rise to other constitutional violations. This issue, however, is beyond the scope of the instant action. As provided in the Complaint and as Papierz has repeatedly conceded throughout the course of this litigation, Papierz pursued a claim under only the Fourth Amendment for an unreasonable

search. While counsel for Papierz at oral argument formally requested leave to amend the Complaint to add a due process claim, we deny this request as Papierz had ample time and opportunity to do so before the district court. Accordingly, the district court did not err in concluding that no Fourth Amendment violation for an unreasonable search occurred.

Papierz also objects to the court's ruling that the Officers were entitled to qualified immunity. Because Papierz's Section 1983 claim fails under the Fourth Amendment, we find it unnecessary to reach the issue of qualified immunity.

IV. CONCLUSION

We **AFFIRM** the district court's order granting summary judgment in favor of Defendants-Appellees on Plaintiff-Appellant's Section 1983 claim under the Fourth Amendment. Because Plaintiff-Appellant's claim fails on the merits, we decline to reach the issue of qualified immunity.

KAREN NELSON MOORE, Circuit Judge, concurring in the judgment. I write separately to express my concern regarding the police officers' alleged conduct in this case. Although the unique

circumstances of this case prevent us from reaching the issue, I believe that police officers act unreasonably when they plant evidence and that such behavior raises constitutional issues.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY PAPIERZ,
Plaintiff,

Case No. 1 :07-CV -115

v.

HON. ROBERT J. JONKER

SCOTT JACKSON &
BRYAN ERGANG,
Defendants.
_____/

ORDER

Defendants' Motion for Summary Judgment (docket # 17) came up for hearing on March 27, 2008. Based on the written and oral arguments of the parties and on all matters of record, and for the reasons articulated at the hearing,

IT IS ORDERED that Defendants' Motion for Summary Judgment (docket # 17) is GRANTED.

Dated: March 27, 2008

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

399 Federal Bldg, 110 Michigan NW,
Grand Rapids, MI 49503 (616) 456-2253

GREGORY J. PAPIERZ,
Plaintiff,

-vs- Case NO.1 :07-CV-0115
Honorable Robert J. Jonker

SCOTT JACKSON and BRYAN ERGANG,
Defendants.

SAMUEL T. FIELD (P30904)
Attorney for Plaintiff
248 West Michigan Avenue
Kalamazoo, Michigan 49007
(269) 343-5581

G. GUS MORRIS (P32960)
Attorney for Defendants

AFFIDAVIT OF GREGORY J. PAPIERZ
IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF MICHIGAN)
) ss.
COUNTY OF KALAMAZOO)

GREGORY J. PAPIERZ, being duly sworn, deposes and says:

1. I am Plaintiff in the above captioned matter. If called as a witness, I can competently testify to the following.

2. Exhibit #1 is a DVD assembled by my attorney combining and synchronizing all of the videotapes and audio recordings of which I am aware that are relevant to the facts that are the subject matter of this lawsuit. Included are (1) the cruiser video from Defendant Jackson's vehicle, (2) the cruiser video from Defendant Ergangs' vehicle, (3) the videotape supplied by Cameron Alger, and (4) the police dispatch tape. I have reviewed each of the individual audiovisual sources separately. Exhibit #1 is a fair and accurate representation of what it purports to show.

3. This lawsuit arises out of the events of February 16, 2006. On that evening, I stopped by the home of a social acquaintance of mine who lived at 2606

Texel Drive in Kalamazoo to see if he wanted to go bowling with me.

4. On the way I had stopped at a convenience store on Gull Road and purchased a Gatorade and a packet of "male enhancement" pills.

5. After leaving the convenience store, I drove southwest on Gull Road to Texel Drive where I turned left, and proceeded to 2606 Texel Drive where my acquaintance resided.

6. I was driving my brothers pickup truck. I pulled into the driveway and parked. As I got out, I was confronted by the police officers who are the defendants in this case.

7. Defendant Jackson asked for my driver's license and registration for the vehicle. I provided the requested documents.

8. Defendant Jackson asked if I had been drinking alcohol. I had not, and advised him so. Defendant Jackson asked me if I knew I

was driving without my headlights on. I, of course, thought they were on.

9. Defendant Jackson accused me of attempting to flee from him. I had not, and advised him so. In fact, I was already parked in the driveway at 2606 Texel Drive when the police first activated their overhead lights, which was my first notice of their presence. Exhibit #2 is a frame from Exhibit #1. The red arrow points to Defendant Jackson's overhead light which is clearly not activated. The location of my vehicle is the red oval. The red rectangle outlines the road ahead of Officer Jackson. While it is difficult to see my truck, it very clear that my vehicle is no longer in the road.

10. Defendant Jackson accused me of walking on the passenger side of my vehicle after parking in the driveway at 2606 Texel. I had not, and I told him so. Exhibit #3 is another frame from Exhibit #1. The red rectangle is Officer Jackson pulling into my friend's driveway behind me. The round rectangle

shows me still sitting in the driver's seat of my vehicle.

11. Defendant Ergang accused me of driving on a suspended and expired license. I knew that my license was not suspended and told him that. Exhibit #4 is my drivers' license record. My license had been suspended on April 8, 2005, because of a delay on my part paying a traffic fine. It was reinstated on August 1, 2005. It was my understanding that my license was renewed in the process of the termination of the suspension.

12. As Exhibit #4 shows, the Township Attorney ultimately agreed (See June 12, 2006 entry) with my attorney that the only offense for which I was responsible was the civil infraction of "Failed to display valid license".

13. Defendant Ergang advised me that I was being placed under arrest for driving on a suspended license. He searched me and placed in the backseat of his cruiser.

14. When Ergang searched me, he took from my pocket the male enhancement pills that I had purchased at the convenience store on Gull Road. He asked me and I told him what the pills were and where I obtained them. I told him that I had bought them at the convenience store.

15. Defendants walked around my vehicle. After a while, they confronted me with some pills they claimed that they found on the ground. These new pills were not the male enhancement pills previously mentioned.

16. Defendants accused me of throwing these new pills on the ground. I had not thrown any pills on the ground. I specifically told defendants that the accusation they were making was false.

17. Defendant Jackson left for a while as I waited in Defendant Ergang's cruiser. When Defendant Jackson returned I also saw him approach a neighboring residence.

18. After speaking with Defendant Jackson, Defendant Ergang told me that it was obvious to him that I had thrown the pills on the ground because:

    I. The pills were dry even though it had rained all day.

    II. The neighbors had supposedly seen me throw the pills on the ground.

    III. The pills were vicodin.

19. I had a heart catherization a few weeks earlier and the doctor had given me a prescription for vicodin. A copy of my prescription is Exhibit #5. I had gone to Walgreens and paid to purchase my vicodin pills.

20. After Defendant Ergang told me that the pills he was accusing me of throwing on the ground were vicodin, I told him that I had a prescription for vicodin. I tried to impress on him that it would be ridiculous for me to

throwaway pills I lawfully possessed and had paid to buy.

21. Defendant Ergang did not challenge me to show him a copy of my prescription, which I thought was very odd.

22. Defendants gave me a ticket for driving without my headlights on and left me there with instructions that I could not drive home because my license was suspended and expired. I called for a ride.

23. While I awaited around I was approached by persons who identified themselves as Cameron "Lucky" Alger and his wife Hollie Langdon.

24. I was a little hostile with them at first because Defendant Ergang claimed they had told defendants that they had seen me throwing pills on the ground. I, of course, knew that I had not.

25. Mr. Alger and his wife told me that they had not told the police anything like that. They

told me that, in fact, they had seen the officers throw the pills on the ground and that they had a videotape of what happened. They showed me the tape and let me copy it.

26. Exhibit #6 is a printout of one of the frames from Exhibit #1. Circled in red is what I believe to be a pill being dropped by Defendant Jackson.

27. Exhibit #7 is a printout of another of the frames from Exhibit #1. Circled in red is what I believe to be a pill being dropped by Defendant Ergang.

28. Based upon the facts of which I am aware, it is my conclusion that defendants Jackson and Ergang had a prearranged plan to stop me. I base that on the following facts.

    I. I had a prior conviction related to marijuana. I have mended my ways and have been a law abiding citizen since fulfilling the requirements of the criminal justice system. Nevertheless,

there have been other occasions where various authorities have indicated to me that they continued to suspect me of criminal activity.

II. I later learned that Defendant Jackson had just completed a 2 year period of undercover work for the Southwest Enforcement Team in October 2005. (Exhibit A, Jackson Deposition, p. 7)

III. Their cruiser videos show that defendants seemed to be waiting around in the area where I was for some specific event to occur.

iv. I have never heard of 2 police officers engaging in a police chase for a motorist driving with his parking lots on instead of headlights.

v. I have never heard of police officers accusing a motorist of attempting to flee when the motorist parked in a

driveway before the officers activated their overhead lights.

vi. A third vehicle appears in the video that honks as it passes the scene of my arrest. It appears that defendants Jackson and Ergang were working with an undercover officer to make a pretext arrest. Exhibit #1, Jackson clock 22:20:33)

29. Based upon the facts of which I am aware, it is my conclusion that Defendants Jackson and Ergang intended to frame me for illegal possession of vicodin. They had obviously obtained vicodin pills from some other source and placed them on the ground near my truck in order to accuse me of illegal possession. I base this allegation on the following facts.

I. Cameron Alger and Hollie Langdon have told me that they saw the officers throwing the pills on the ground.

II. I have seen the video and I believe that I can see defendants dropping the pills.

III. I understand that defendants have marked in evidence 2 pills that are, in fact, vicodin.

iv. Defendant Ergang told me that the pills were dry indicating that they were on the ground a short period of time since it had rained the day of the incident. Since I did not throw them on the ground, defendants must have.

v. Defendant Jackson supposedly was not sure the pills were vicodin until that fact was confirmed by a doctor at Borgess Hospital. I have carefully watched his cruiser tape. He is out of view for about 3 minutes while his cruiser was parked at Borgess Hospital with his microphone off. (Exhibit #1 from 22:24:22 to 22:27:25 on Officer Jackson's clock) Based upon my

experience in Emergency Rooms, 3 minutes is not nearly enough time to (1) walk from the parking lot into an Emergency Room, (2) speak to the receptionist and get the attention of an emergency room doctor who is presumably working, (3) speak to the doctor, and (4) walk back to the cruiser. What makes defendant Jackson's account even more incredible is that he cannot identify the doctor to which he spoke. I conclude that Jackson knew all along that the pills were vicodin and that the trip to Borgess was a sham.

vi. Defendants did not place crime scene tape around my truck and get an evidence crew there to look for other evidence. Without doing so, how could they be sure that there were not other pills on the ground. If for no other reason, it would seem important to search for other pills to protect an unsuspecting child from accidentally finding and taking the

pill. I conclude that defendants already knew there were no more pills on the ground because that was all they had put there.

vii. When I told Defendant Ergang I had a written prescription, he did not demand to see it. I, of course, have one (Exhibit #5). He had repeatedly accused me of lying to him. It is not believable that he would suddenly take my word for it that I had a prescription without actually seeing it.

viii. Exhibit #1 shows Mr. Alger and his wife tell Officer Jackson that it was not me who had thrown pills on the ground, that it had been police officers (Exhibit #1, Alger clock 10:33:37).

ix. Officer Jackson and Officer Ergang speak privately (Jackson clock 22:32:56) Officer Ergang lied to me indicating that Cameron Alger and Holly Langdon would incriminate me (Exhibit #1, Ergang clock 22:34:27).

Apparently, he thought he could bully me into confessing to something I had not done.

x. Defendants had the "male enhancement" pills tested. They did not have the vicodin pills tested. I conclude that defendants already knew they were vicodin because they had planted the pills themselves.

29. I conclude that defendants conducted an unreasonable search, involving planting evidence, for the purpose of framing me, but abandoned their plan because of the intervention of Cameron Alger and Hollie Langdon.

FURTHER DEPONENT SAYETH NOT.

/s/ Gregory J. Papierz
GREGORY J. PAPIERZ

Subscribed and sworn to me
this 14th day of January, 2008.

/s/ Samuel T. Field
Samuel T. Field Notary Public
Kalamazoo County, Michigan
My Commission Expires: May 3, 2011

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

399 Federal Bldg, 110 Michigan NW,
Grand Rapids, MI 49503 (616) 456-2253

GREGORY J. PAPIERZ,
Plaintiff,

-vs- Case NO.1 :07-CV-0115
Honorable Robert J. Jonker

SCOTT JACKSON and BRYAN ERGANG,
Defendants.

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248 West Michigan Avenue
Kalamazoo, Michigan 49007
(269) 343-5581

G. GUS MORRIS (P32960)
Attorney for Defendants

AFFIDAVIT OF CAMERON ALGER

STATE OF MICHIGAN)
) ss.
COUNTY OF KALAMAZOO)

CAMERON ALGER, being duly sworn, deposes and says:

1. If called as a witness, I can competently testify to the following.

2. I have reviewed the DVD identified as Exhibit #1. The video in the middle bottom of the screen is a videotape made by myself and my wife on February 16, 2006.

3. The factual observations made by myself and my wife that are recorded on the videotape we made are all true to the best of my information, knowledge and belief. Exhibit #1 is a fair and accurate representation of what it purports to show.

4. I did not know Greg Papierz until after the events recorded in Exhibit #1. I approached him after the police left to tell him what I had observed.

5. I saw a man, or men, in police uniforms dropping pills on the ground near my house in the area where Mr. Papierz parked. Mr. Papierz did not toss or drop any pills on the ground.

6. It was my conclusion on the evening of February 16, 2006, that the police officers were planting evidence in the area of Mr. Papierz's truck as part of a plan to frame him with some kind of criminal offense.

FURTHER DEPONENT SAYETH NOT.

/s/ Cameron Alger
CAMERON ALGER

Subscribed and sworn to me
this 15th day of March, 2008.

/s/ Samuel T. Field
Samuel T. Field Notary Public
Kalamazoo County, Michigan
My Commission Expires: May 3, 2011